

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.K. CARBERRY, R.Q. WARD, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BENJAMIN T. MCDANIEL
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201100573
GENERAL COURT-MARTIAL**

Sentence Adjudged: 1 July 2011.

Military Judge: LtCol David M. Jones, USMC.

Convening Authority: Commanding General, 3d Marine
Logistics Group, Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol E.H. Robinson,
Jr., USMC.

For Appellant: CDR Howard Liberman, JAGC, USN.

For Appellee: LCDR Deborah Sue Mayer, JAGC, USN; Capt Mark
V. Balfantz, USMC.

14 February 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of one specification of conspiracy, three specifications of violating a lawful general order, one specification of making a false official statement, one specification of adultery, and one specification of obstruction of justice, in violation of

Articles 81, 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 907, and 934. The military judge sentenced the appellant to confinement for twenty-four months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the findings and the sentence as adjudged, but suspended all confinement in excess of ten months pursuant to a pretrial agreement.

The appellant's sole assigned error is that, pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), both Specifications 1 and 2 of Charge IV (adultery and obstruction of justice) fail to state an offense because the specifications do not allege the terminal element of Article 134. We disagree.

The appellant's case is significantly distinguishable from *Fosler* because the appellant: (1) did not challenge the adequacy of the specifications at trial; (2) pled guilty to the specifications; (3) acknowledged that he understood the terminal element of the offenses; and, (4) upon inquiry into the terminal element by the military judge, provided a detailed factual basis to establish he was guilty of conduct prejudicial to good order and discipline, or of a nature to bring discredit upon the armed forces. Accordingly, we resolve the assigned error adverse to the appellant. See *United States v. Hackler*, __ M.J. __, No. 201100323 (N.M.Ct.Crim.App. 22 Dec 2011).

After careful consideration of the record, we affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court